STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN S. CALL,

Plaintiff-Appellant,

v

LANNY G. CALL, SR.,

Defendant-Appellee.

UNPUBLISHED
September 28, 1999

No. 208704
Saginaw Circuit Court
LC No. 96-014601 DO

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff Kathleen S. Call appeals by right a judgment of divorce in which she received approximately sixty percent of the marital estate according to the trial court's calculations. We reverse in part, affirm in part, and remand.

Plaintiff's primary challenge concerns the trial court's finding that defendant had an unvested interest in his early retirement supplement (ERS) and, therefore, the ERS was not subject to division as part of the marital estate. As a consequence, the resulting property division inequitably favored defendant. This Court reviews a lower court's findings of fact in a divorce case for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). A finding is clearly erroneous when, although there is evidence to support the finding, this Court is left with a definite and firm conviction that a mistake has been made. *Berry v State Farm Mut Automobile Ins Co*, 219 Mich App 340, 345; 556 NW2d 207 (1996). If there is no clear error in the findings of fact, then this Court must then determine if the property division was fair and equitable in light of those facts. *Draggoo v Draggoo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997). The dispositional ruling is discretionary, however, and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Id*. at 430. We agree with plaintiff with respect to the court's findings and the inequity of the property division.

MCL 552.18(1); MSA 25.98(1) requires a trial court to include vested retirement benefits in the martial estate, making them subject to division. Even if retirement benefits are not vested, MCL 552.18(2); MSA 25.98(2) permits the trial court to include them in the marital estate where just and equitable. In *Perry v Perry*, 133 Mich App 453, 457-458; 350 NW2d 275 (1984), we noted that a

retirement "plan is said to have vested when the employee's right to pension funds becomes irrevocable and will survive voluntary termination of employment. It is said to have matured when the employee acquires an unconditional right to immediate payment, whether or not that right is exercised." In contrast, unvested interests are subject to contingencies like unilateral termination by an employer or a prerequisite period of future employment. *Bolt v Bolt*, 113 Mich App 298, 302; 317 NW2d 601 (1982).[1]

Nothing in the record explained what, if any, contingencies may affect defendant's interest in the ERS. Nor did the record verify defendant's allegation that the ERS can be revoked at any time. Defendant did not express any uncertainty about whether he would actually continue to receive the ERS in the future. See *Perry, supra* at 457-458; *Boyd v Boyd*, 116 Mich App 774, 781-782; 323 NW2d 553 (1982); *Bolt, supra*. The fact that defendant began receiving the ERS in 1994 and has continued to receive it without interruption suggests that the ERS is not only vested but also is "mature." *Perry, supra* at 456-458. Consequently, the trial court erred when it found that the ERS was unvested and failed to include it in the marital estate pursuant to MCL 552.18(1); MSA 25.98(1). See also *Vollmer v Vollmer*, 187 Mich App 688, 689-690; 468 NW2d 236 (1990).

Even assuming that the trial court correctly found that the ERS was unvested, equity required the court to include the ERS in the marital estate. MCL 552.18(2); MSA 25.98(2). The trial court crafted a distribution of assets that appeared to favor plaintiff in accordance with its finding that defendant was slightly more at fault for the break down of the marriage. In order "to grant equity," essentially taking into consideration the parties' relative financial need in light of defendant's income from the ERS, the trial court further increased plaintiff's share of the marital estate and ordered defendant to pay her COBRA benefits for three years. See *Sparks, supra* at 160. In round numbers, plaintiff received $37,660 more than defendant pursuant to the trial court's calculations; this included the limited temporary alimony award and thirty-six months of $238 per month COBRA health benefit payments. Nevertheless, the value of plaintiff's "greater" share of the martial estate pales in comparison to the value defendant obtains by not sharing the ERS, which is worth approximately $259,000 over twelve years before being reduced to present value.

We also consider it significant that defendant earned his interest in the ERS completely within the duration of his marriage to plaintiff. See *Vander Veen v Vander Veen*, 229 Mich App 108, 110; 580 NW2d 924 (1998); *Vollmer, supra* at 689, citing MCL 552.18(2); MSA 25.98(2). Moreover, the parties agreed that defendant would retire early to qualify for the ERS and they both became dependent on its income stream. These circumstances firmly convince us that the ERS was a marital asset and should be divided as such. Therefore, we reverse the trial court's decision to exclude the ERS from the marital estate and remand. The trial court shall divide the asset in an equitable manner according to the factors outlined in *Sparks, supra* at 159-160. In light of this conclusion, we need not reach the merits of plaintiff's alternative argument that the trial court erred by failing to award her alimony.

Plaintiff also contends that the trial court erred by failing to grant her request for attorney fees because, otherwise, she will be forced to use the assets awarded in the divorce that she is using to support herself to pay for her attorney. We review a decision to award or deny attorney fees in a

divorce case for an abuse of discretion. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). We see no abuse of discretion in this case because it is likely that defendant would have to invade his portion of the marital assets to pay plaintiff's attorney fees as a lump sum. See *Hanaway v Hanaway*, 208 Mich App 278, 298-299; 527 NW2d 792 (1995); *Nalevayko v Nalevayko*, 198 Mich App 163, 165; 497 NW2d 533 (1993). Ability to pay is a relevant factor in the decision to award or deny attorney fees. See MCR 3.206(C).

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. No costs or fees awarded as plaintiff did not prevail in full. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[1] If the party with the vested interest can show a high probability exists that the working party will never receive any pension benefits from the plan, however, the trial court may decline to consider the pension interest as a marital asset. *Bolt, supra*.